

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 10 March 2006

BALCA Case No.: 2004-INA-00320
ETA Case No.: P2003-NJ-02491309

In the Matter of:

MCNAMARA CARPENTERS FINE HOMEBUILDERS,
Employer,

on behalf of

GUILHERME PASSOS MONTEIRO REPOLES,
Alien.

Appearance: Cassandre C. Lamarre, Esquire.¹
Newark, New Jersey
For the Employer and the Alien

Certifying Officer: Dolores DeHaan
New York, New York

Before: **Burke, Chapman, and Vittone**²
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien employment certification. Permanent alien employment certification is governed by

¹ In letters dated June 30, 2004, and July 9, 2004, Ms. Cassandre C. Lamarre stated that she was no longer with the firm, Wall Street Associates, and thus no longer represented any of her former immigration clients. She requested that all future correspondence in this case be directed to Ms. Andrea Matos of Wall Street Associates. (AF 1-3).

² Associate Chief Administrative Law Judge Thomas M. Burke did not participate in this matter.

section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations.³ We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 30, 2001, the Employer filed an application for alien employment certification on behalf of the Alien, Guilherme Passos Monteiro Repoles ("the Alien"), to fill the position of "Truss Carpenter." (AF 98-101). The Employer also requested Reduction in Recruitment ("RIR") processing, stating the following: "This is a request for an Advanced Recruitment. R.I.R." (AF 83). The Employer described the job to be performed on the application as follows: "Erects premade wood roof trusses on top plates of frame structur [sic] using hammer, nails, saws, levels and other hand and power tools. Prepares layout for positioning trusses from building plans and blueprints. Supervises one truss carpenter helper. Work days: Monday thru Friday." (AF 79).

The Employer had advertised the position in *The Star-Ledger* newspaper of the County of Essex on April 4, 5, and 6, 2001, (AF 74-75), and on the windows of its company and company trucks from April 7, 2001, to April 26, 2001. (AF 77-78). However, the Employer reportedly received no responses to any of its advertisements. (AF 73, 76-77).

After receiving the Employer's application for alien employment certification, the New Jersey Department of Labor advised the Employer that its Federal Employer Identification Number ("FEIN") was listed under a different address than the address given by the Employer in its application. It also reported that the Employer's original

³ This application was filed prior to the effective date of the "PERM" regulations. See 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

750-A application was signed on April 27, 2001, but was replaced with a 750-A application dated April 21, 2001, that changed the Employer's telephone number without initialing the change. Lastly, it advised the Employer that its newspaper advertisement listed a rate of pay below the prevailing wage and that the listing did not specify the job title of "Truss Carpenter." (AF 61, 72).

In response to the notification of defects in its application for alien employment certification, the Employer amended its application (AF 68-72) and also changed its advertisements with respect to the position's rate of pay. (AF 67). The Employer posted the advertisements on the windows of its company and on its company trucks from November 20, 2002, to December 13, 2002, but reported that again there were no responses to its advertisements. (AF 65-66).

On October 22, 2003, the CO issued a Notice of Findings ("NOF") proposing to deny certification. In the NOF, the CO denied the Employer's request for RIR, explaining that the Employer's listing in the New Jersey Unemployment Insurance computer system had been inactive since December 31, 1989, and was listed under a slightly different name and a different address and telephone number than that given by the Employer in its application for alien employment certification. (AF 53-54).

The CO advised the Employer that in order to rebut the NOF, it had to explain why it did not have an active listing in the New Jersey Unemployment Insurance computer system. If the Employer claimed to have an active listing, it had to furnish the name and number under which it was listed. To prove itself operational, the Employer had to document the number of workers it employed in 2001 and 2002, and give their names, job duties, and job statuses. In addition, it had to "submit copies of W-2 or 1099-MISC forms, whichever are applicable, for 2001 and 2002... also furnish copies of its Federal Income Tax returns for 2001 and 2002." The Employer also had to designate its areas of specialty within the carpentry profession. Lastly, the Employer had to document its willingness to advertise the position. (AF 54).

On November 25, 2003, the Employer's attorney requested an extension to file the rebuttal to the NOF. The CO granted the extension, giving the Employer's attorney until December 31, 2003, to submit the rebuttal. (AF 51). The Employer filed the rebuttal on December 23, 2003. Its rebuttal included an employee list for 2001–2003, a company telephone bill, W-2 forms of its employees for 2001 and 2002, and its Federal Income Tax returns for 2001 and 2002. (AF 23-50).

In response to the Employer's rebuttal, the CO issued a second Notice of Findings ("SNOF") on January 23, 2004, proposing once again to deny certification. The CO explained that the Employer's rebuttal did not address its inactive FEIN, explaining that the Employer still "must document why there is no current active record of his company in the State UI system." The CO explained that the lack of a record of the Employer in the State Unemployment Insurance system could indicate that it had no employees. Thus, the CO instructed the Employer to submit additional documentation for the years 2001, 2002, and 2003, including copies of Form NJ-927, Employer's Quarterly Report, and Form W-30, Employer's Report of Wages Paid. (AF 20-22).

The SNOF also advised the Employer that its rebuttal failed to address its areas of specialty within the carpentry profession. It instructed the Employer to submit documentation showing that it can guarantee permanent, full-time employment to its carpentry workers within its specialty, including copies of past contracts of its workers for 2001, 2002, and 2003. The SNOF also instructed the Employer to indicate its willingness to advertise its position. (AF 21-22).

In its second rebuttal, dated February 27, 2004, the Employer again failed to provide the documentation requested by the CO. The Employer failed to address its inactive FEIN. It failed to submit Form NJ-927 or Form W-30 for 2001, 2002, and 2003. It also failed to indicate a willingness to advertise its position. The Employer did, however, address its area of specialty within the carpentry profession, but it failed to submit any past work contracts. The Employer commented on its decision against providing the requested information to the CO: "As I already know you have no intention

of approving this notice of finding. I do not see the point in providing further information as you will not even take it into consideration.” (AF 14).

Because the Employer failed to submit the documentation requested in the SNOF, the CO found that the Employer’s second rebuttal failed to cure the deficiencies noticed in the SNOF, and thus issued a Final Determination on March 17, 2004, denying alien employment certification as discussed below. (AF 12-13). The Employer requested review of the CO’s decision and the Board of Alien Labor Certification Appeals (“Board”) docketed the case on August 10, 2004.

DISCUSSION

Under 20 C.F.R. § 656.3, an “employer” is defined as “a person, association, firm or corporation which currently has a location within the United States to which U.S. workers may be referred for employment.” When an employer files an application for alien employment certification, it is signifying that it has a *bona fide* job opportunity that is open to U.S. workers. *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (*en banc*). The job opportunity must truly exist and be open to any qualified U.S. worker, 20 C.F.R. § 656.20(c)(8), and the burden is on the Employer to prove that it is offering a *bona fide* job opportunity and full-time employment. *See Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (*en banc*).

In pursuing an application for alien employment certification, an employer must provide information sought by the CO if such information has a direct bearing on the resolution of an issue and is obtainable by reasonable effort. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Failure to submit documentation reasonably requested by the CO warrants denial of an employer’s application for alien employment certification. *Gencorp, supra*. In addition, under 20 C.F.R. § 656.25(e)(3), all findings in the Notice of Findings not rebutted are deemed admitted.

Here, in the NOF and SNOF, the CO repeatedly stated that the Employer had to explain its inactive FEIN and had to prove its ability to offer full-time employment to the alien within its specialized area of carpentry. (AF 21-23, 53-54). Although the Employer submitted an employee list, a company telephone bill, W-2 forms, and Federal Income Tax returns, it never corrected or explained the deficiency involving its FEIN, nor did it ever provide proof that it could offer full-time employment to the Alien in its area of carpentry.

The CO's NOF and SNOF notified the Employer of its inactive FEIN and gave the Employer two rebuttal opportunities to offer an explanation for this deficiency. (AF 21-23, 53-54). The CO advised the Employer that its inactive FEIN could indicate that it had no employees. Thus, the CO instructed the Employer to submit Forms NJ-927 and W-30 for proof that it had employees. However, the Employer failed to explain its inactive FEIN or submit the requested Forms NJ-927 and W-30. The CO's NOF and SNOF also instructed the Employer to indicate its willingness to advertise its position. (AF 15-16, 24-25). However, the Employer never indicated this willingness to advertise in either of its rebuttals. (AF 14, 23-50). The CO's SNOF instructed the Employer to prove it could guarantee permanent, full-time employment to its carpentry workers, by submitting copies of its contracts for 2001, 2002, and 2003. (AF 21-22). However, the Employer also failed to submit this documentation. (AF 14, 23-50).

The documentation requested by the CO in the NOF and SNOF was critical in establishing the existence of a *bona fide* position in this case. As stated above, an employer's failure to submit documentation reasonably requested by the CO warrants denial of certification. *Gencorp, supra*. Here, the Employer failed to provide the documentation reasonably requested by the CO, and thus failed to prove that it had a *bona fide* job opportunity as mandated by 20 C.F.R. § 656.20(c)(8). Accordingly, the Employer's application for alien employment certification is denied.

This application was before the CO in the posture of a request for RIR. In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denies

an RIR, such a denial should result in the remand of the application to the local job service for regular processing. Subsequent to *Compaq Computer, Corp.*, however, this panel recognized that a remand is not required where the application is so fundamentally flawed that a remand would be pointless, such as here, where a finding of a lack of a *bona fide* job opportunity exists. *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004). Accordingly, the CO's denial of labor certification is affirmed.

ORDER

The CO's denial of alien employment certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North
Washington, DC 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.